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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

TOM ROLFS, SUPERINTENDENT,

Petitioner,

v.

LOUIS EUGENE RUSSELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the plain statement requirement of *Harris v. Reed*,[1] satisfied when an intermediate state appellate court makes a plain statement that its judgment rests upon a state procedural bar and the state's highest appellate court denies a request for discretionary review of that decision?

2. When the state fulfills its statutory obligation to advise the court that a federal habeas petitioner has failed to exhaust state court remedies, is the state precluded from asserting a procedural bar defense in response to a second petition, when the state court imposed an adequate and independent procedural bar during the exhaustion process?

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[1] 109 S. Ct. 1038 (1989).

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BNA Directory of State Courts, Judges, and Clerks: A State-By-State Listing, The Bureau of National Affairs, Inc., Washington, D.C., Second Edition, 1988 6

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed January 9, 1990, with the petition for rehearing, with suggestion for rehearing en banc, denied November 29, 1990.

OPINIONS BELOW

The opinion of a divided panel of the United States Court of Appeals for the Ninth Circuit, reversing the district court and remanding for hearing on the merits, was reported at 893 F.2d 1033 (1990) and appears at Appendix A. The petition for rehearing, with suggestion for rehearing en banc, was denied by order entered November 29, 1990, and appears at Appendix B. The unreported order and judgment

of the district court denying Mr. Russell's petition for federal habeas relief was entered on May 20, 1988, and appears at Appendix C. The state court of appeals' unreported order dismissing Mr. Russell's personal restraint petition, was entered on April 15, 1987, and appears at Appendix D. The Washington Supreme Court Commissioner's unreported ruling denying discretionary review of the Court of Appeals' decision was entered on July 24, 1987, and appears at Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 9, 1990. Rehearing, with suggestion for rehearing en banc, was denied November 29, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is codified at 28 U.S.C. § 2254, and is set forth verbatim in Appendix F.

STATEMENT OF THE CASE

Louis Russell was initially charged in Washington state court with murder in the first degree, attempted murder in the first degree and rape. The jury in the original state trial found Russell not guilty of murder in the first degree, but deadlocked on the other two charges and a mistrial was declared. *State v. Russell*, 33 Wash. App. 579 (1983).

In a second trial on an amended information, Russell was convicted of murder in the second degree, attempted murder in the second degree and rape. *Id.* Russell appealed to the Washington Court of Appeals, raising seven grounds for relief in his challenge of all three convictions.[1] *Id.*

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[1]Those seven issues were as follows: (1) denial of presumption of innocence; (2) denial of due process due to prosecutorial misconduct; (3) denial of the right to confront and cross-examine adverse witnesses; (4) double jeopardy precludes retrial after a hung jury; (5) limitations on amendment of the information on retrial after hung jury; (6) failure to join related offenses; and (7) jury unanimity as between felony murder and intentional murder

The state court of appeals affirmed all three convictions after which Russell petitioned the Washington Supreme Court for discretionary review. Russell's petition for discretionary review presented the state supreme court with four of the seven grounds raised in the court of appeals, thereby abandoning his presumption of innocence, prosecutorial misconduct and right to confrontation issues. *State v. Russell*, 101 Wash.2d 349 (1984).

Russell next filed his first petition for federal habeas relief. In his petition, Russell raised the three grounds for relief that he had presented to the Washington Court of Appeals but later abandoned in the Washington Supreme Court. Since those three issues had plainly failed to be presented to the Washington Supreme Court, the district court granted Respondent's motion and dismissed Russell's petition without prejudice, for failure to exhaust. *Russell v. Rolfs*, 893 F.2d 1033, 1034 (9th Cir. 1990). In briefing the exhaustion issue before the district court, the Respondent's[2] memorandum of authorities described Washington's personal restraint petition procedure[3] as being "adequate and available" as a means of meeting the exhaustion requirement of 28 U.S.C. § 2254(b) and (c).

Russell returned to state court and raised the three unexhausted issues in a personal restraint petition. However, the state court of appeals found that Russell was procedurally barred from raising these claims because they had already been heard and determined on direct appeal and there had been no intervening substantial change in the law. See Appendix D (citing *In re Taylor*, 105 Wash.2d 683, 687-88 (1986)).[4]

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[2]The Respondent on the first federal habeas petition was prison Superintendent William Callahan.

[3]The personal restraint petition procedure is a method by which an offender can mount a post conviction or collateral challenge to a criminal conviction. See Washington Rules of Appellate Procedure (RAP) 16.1-16.15.

[4]The state court of appeals also barred a fourth ground which merely raised the cumulative effect of the first three grounds.

In his ruling denying Russell's motion for discretionary review, the Washington Supreme Court Commissioner[5] agreed that the three grounds had already been heard and determined on direct appeal and were therefore procedurally barred by *Taylor* from being redetermined in Russell's collateral challenge to his conviction by way of the personal restraint petition procedure. *See* Appendix E. In addition, the commissioner agreed that the "ends of justice" exception to the *Taylor* procedural bar rule had not been met. *Id.*

Thereafter, having now fairly presented each of his three claims to the Washington Supreme Court, Russell returned to the district court and filed his second petition for federal habeas relief.[6] However, upon the state's motion, the district court denied Russell's petition. The district court held that since Russell had been procedurally barred by the state courts, he was also precluded from pressing the barred claims on federal habeas review due to his failure to demonstrate adequate cause for his default. *See* Appendix C.

Russell subsequently pursued an appeal of the district court's decision with the United States Court of Appeals for the Ninth Circuit. After briefing and oral argument, the circuit court reversed and remanded for a hearing on the merits of Mr. Russell's grounds for relief.

The circuit court first held that the Washington Supreme Court had "found no error in the state court of appeals' application [of the procedural bar rule] of *In re Taylor*".[7] *Russell*, 893 F.2d at 1035. The circuit court also held, in seemingly contradictory terms, that the Washington Supreme Court was the last state court rendering a judgment in the case, and that it had denied discretionary

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[5]The Commissioner is an employee of the court who screens motions for discretionary review pursuant to RAP 17.2(a).

[6]Russell raised the three previously unexhausted grounds as well as the fourth ground that raised the cumulative effect of the first three grounds.

[7]However, the circuit court misinterpreted state law in Footnote 3 of the Opinion, mistakenly asserting that the *Taylor* bar was inapplicable to Russell's claim in the State Supreme Court. The circuit court failed to recognize that it was bound by the Washington Supreme court's interpretation of Washington law, *see Mullaney v. Wilbur*, 421 U.S. 684 (1975).

review rather than "clearly and expressly" relying upon procedural default in denying Russell relief. *Id.*

Thereafter, the circuit court alternatively held *sua sponte* that the state was estopped from pursuing a procedural bar defense to the second habeas petition in federal court.[8] *Russell*, 893 F.2d at 1037. Relying upon the dissent in a non-habeas case,[9] the circuit court based its holding on counsel's positions in both habeas petitions and in the state court personal restraint petition proceedings.[10] In the first habeas petition, when addressing Russell's failure to exhaust, the state's counsel stated that Washington's personal restraint petition procedure was "adequate and available" for meeting the exhaustion requirement of 28 U.S.C. § 2254(b) and (c).[11] Thereafter, during state court personal restraint petition proceedings, the state prosecuting attorney successfully pressed the *Taylor* procedural bar defense. Finally, in the second habeas petition, the state's counsel conceded that Russell's grounds were exhausted. However, the state then successfully asserted that federal habeas review was precluded because of the adequate and independent state procedural bar of *Taylor* imposed by the Washington courts. *Russell*, 893 F.2d at 1039.

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[8]It should be noted that, although the estoppel issue was exhausted, Russell had bandoned it by failing to present it to either the district court or the circuit court.

[9]*See Religious Tech. Ctr., Cm. of Scientology v. Scott*, 869 F.2d 1306, 1310 (9th Cir. 1989) (Hall, J. in dissent).

[10]Under Washington law, the Attorney General usually represents the state in federal habeas proceedings while the county prosecuting attorney usually represents the state in collateral challenges to convictions filed in state court. This is the practice that was followed in Russell's case.

[11]It should be noted that Mr. Callahan's counsel made no representation to the district court that Russell would prevail in his personal restraint petition, nor that there was an absence of defenses on the merits or of a procedural nature, that could be raised in defense to such a petition.

REASONS FOR GRANTING THE WRIT

A. The Circuit Court's Decision Below Misconstrues The Plain Statement Requirement Of Harris And Undermines This Court's Procedural Bar Doctrine.

This case presents the Court with an important question of federal law that affects every state whose highest court exercises discretionary review jurisdiction,[12] and upon which the Ninth Circuit court differs with every other circuit to address the question. That question is, whether the plain statement requirement of *Harris v. Reed*, 109 S. Ct. 1038 (1989), is satisfied when an intermediate state appellate court makes a plain statement that its judgment rests on a state procedural bar, and the state's highest appellate court denies a request for discretionary review of that decision. In answering this question in the negative, the Ninth Circuit has construed *Harris* in a manner that creates ambiguity where none existed before.

1. The Court Below Misapplied The Harris Plain Statement Rule.

The procedural bar doctrine is now a well settled principle of this Court's federal habeas corpus jurisprudence. If a petitioner at one time could have raised his federal claim in state court, but failed to do so, and is now barred from doing so by a state rule of procedure, he is precluded from litigating that claim in federal court. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

In adopting the procedural bar rule of *Sykes*, this Court expressly rejected the previous intentional by-pass standard enunciated in *Fay v. Noia*, 372 U.S. 391 (1963). *Murray v. Carrier*, 477 U.S. 478, 485 (1986).[13]

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[12]Thirty-seven states have two-tiered appellate court systems. The high courts in thirty-five of those states exercise discretionary review almost exclusively. *See BNA's Directory of State Courts, Judges, and Clerks: A State-By-State Listing*, The Bureau of National Affairs, Inc., Washington, D.C., Second Edition, 1988.

[13]In order to avoid the procedural bar rule, a federal habeas petitioner must demonstrate "cause" for the procedural default, as well as actual "prejudice" attributable thereto. *Wainwright v. Sykes*, 433 U.S. at 87; *accord Frances v. Henderson*, 425 U.S. 536, 542 (1976).

The historical and theoretical foundation of the procedural bar doctrine of *Sykes* is the "adequate and independent state ground" doctrine. *Wainwright v. Sykes*, 433 U.S. at 78-79, 81-82, 87. In resolving the continuing problem of the state courts' oft-times ambiguous invocation of procedural bar rules, this Court looked to the doctrine's theoretical foundation to identify a cure. *Harris v. Reed*, 109 S. Ct. at 1042.

The *Harris* court dealt with an Illinois court's ambiguous ruling that "did not appear to make two rulings in the alternative, but rather note[d] a procedural default and then ignore[d] it, reaching the merits instead." *Harris*, 109 S. Ct. at 1041 (quoting the district court's opinion). Having previously dealt with such ambiguity in cases on direct review, pursuant to 28 U.S.C. § 1257, the *Harris* court looked to *Michigan v. Long*, 463 U.S. 1032 (1983), which resolved the analogous direct review problem. *Harris*, 109 S. Ct. at 1042-43.

The *Long* Court laid down a rule which held that if it fairly appears that the state court rested its decision primarily on federal law, then the United States Supreme Court may reach the federal question on direct review, unless the state court's opinion contains a plain statement that its decision rests upon an adequate and independent state ground. *Long*, 463 U.S. at 1042. The *Harris* Court reasoned that since the ambiguity creates the same problem on federal habeas review:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " 'clearly and expressly' " states that its judgment rests on a state procedural bar.

Harris, 109 S. Ct. at 1043 (citations omitted).

By holding that the Washington Supreme Court had not imposed a procedural bar, the Ninth Circuit frustrated the Washington courts' legitimate interest in orderly state rules of procedure. Further, after creating an ambiguity it-

self, the court below then misused the plain statement rule of *Harris* to viscerate the adequate and independent procedural bar holding of the state court of appeals.

In applying this Court's plain statement requirement to the case at bar, the Ninth Circuit ignored the theoretical underpinnings of *Harris* and instead, has used that requirement to create ambiguity where none existed. However, the only principled construction of *Harris* requires a federal habeas court to look to the underlying judgment of the lower court for the plain statement when the state's supreme court has declined to exercise discretionary review.

2. The Decision Below Has Created A Division In The Circuits.

In applying this Court's holding in *Harris*, the four other circuits that have addressed the issue have drastically differed with the Ninth Circuit in their interpretation of the phrase "last state court rendering a judgment in the case" in conjunction with the "plain statement" requirement.

The Fourth Circuit recently addressed the issue of whether a state supreme court's unexplained denial of certiorari to review a lower court's decision that was explicitly based upon procedural default, meets the plain statement requirement of *Harris*. *Felton v. Barnett*, 912 F.2d 92 (4th Cir. 1990). In deciding this issue in a manner diametrically opposed to the Ninth Circuit's decision, the *Felton* court found the nature of certiorari review to be determinative. *Id.*

The *Felton* Court first noted that "certiorari is a discretionary form of review and is not one of right." *Felton*, 912 F.2d at 94. As such, it "is not a judgment but is simply a refusal to hear the appeal." *Id.* Further, just as in this Court's certiorari jurisprudence,[14] the denial of "certiorari imports no expression of opinion on the merits of the case", but is

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[14]Citing to this court's decisions in *United States v. Carver*, 260 U.S. 482, 490 (1923) and *Brown v. Allen*, 344 U.S. 443, 491-92 (1953) (separate opinion of Frankfrter, J.)

merely a decision that the case "is not of sufficient importance to warrant review". *Felton*, 912 F.2d at 95.

Thus, in applying *Felton* to the present case, the Fourth Circuit would have looked through the Washington Supreme Court's denial of discretionary review and examined the state court of appeals' judgment. Since the state court of appeals had exercised its jurisdiction in Russell's case and had rendered a written judgment, the Fourth Circuit would have looked to that court for the "plain statement." Since the state court of appeals explicitly applied the *Taylor* procedural bar, the Fourth Circuit would have upheld the district court in *Russell*, and precluded federal habeas review of his procedurally barred claims.

The Seventh Circuit reviewed a habeas appeal that entailed a procedural history similar to that of *Felton*, and rendered an opinion consistent with that of the Fourth Circuit. *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990). Unlike the Ninth Circuit, the *Prihoda* court reasoned that *Harris*' focus was "not to tell state courts how to write opinions, *but to ensure that the federal court knows whether the state is relying on its own law as the basis of decision.*" *Prihoda*, 910 F.2d at 1383 (emphasis added).

The *Prihoda* Court properly viewed the *Sykes* procedural bar doctrine as being based upon "principles of comity and economy". *Prihoda*, 910 F.2d at 1383. The Seventh Circuit reasoned that neither of these two principles is served by supposing that a silent affirmance or denial of discretionary review somehow abrogates a sufficient state law reason already given. *Id.*

The *Prihoda* Court also explained its decision by reviewing this Court's direct review process:

> When reviewing the judgment of a state court, the Supreme Court examines the opinion given by the highest state court that has supplied an explanation. It looks straight through denials of discretionary review, on the authority of 28 U.S.C. § 1257 (a), which speaks of the final judgment "rendered by the highest court of a state in which a decision could be had"—that is, the highest court that has rendered decision on the merits.

Prihoda, 910 F.2d at 1383 (*citing Sullivan v. Texas*, 207 U.S. 416 (1908); *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Keith v. Clark*, 97 U.S. 454, 455-57 (1878)).

Thus, just as the Fourth Circuit would look through the denial of discretionary review, the Seventh Circuit would also look to the state court of appeals' judgment for the *Harris* plain statement. The Seventh Circuit opined that its holding was dictated by and consistent with the principles underlying the procedural bar doctrine as well as this Court's analogous decisions regarding direct review of state court decisions.

In a case again involving the denial of discretionary review of a lower court's explicit procedural bar holding, the Fifth Circuit also found the direct review comparison as being persuasive. *Goodwin v. Collins*, 910 F.2d 185 (5th Cir. 1990). The *Goodwin* Court noted that when "a state intermediate appellate court renders a decision, and *the highest state court thereafter simply denies discretionary review, then it is the judgment of the intermediate appellate court which is reviewed* in the United States Supreme Court on certiorari, and the writ of certiorari runs to the intermediate appellate court." *Goodwin*, 910 F.2d at 187 (emphasis added).

Thus, the Fifth Circuit held, just as the Fourth and Seventh Circuits had, that the *Harris* Court's reference to the last state court rendering a judgment in the case refers to the court whose judgment would be reviewed by this court on direct review. *Goodwin*, 910 F.2d at 187.

In a case similar to *Russell*, the Eleventh Circuit dealt with a petitioner who had filed a post-conviction motion in state court raising his federal claim. In response, the state court explicitly denied the motion because the petitioner could have, but failed to, raise his claim on direct appeal or in his first post-conviction motion. *Harmon v. Barton*, 894 F.2d 1268, 1269-70 (11th Cir. 1990). In ruling upon *Harmon's* appeal of the lower court's explicit decision imposing a procedural bar, the appellate court affirmed without comment. *Id.*

In a decision that points out the inadequacies of the Ninth Circuit's decision below, the Eleventh Circuit reasoned that the state appellate court's "affirmance without comment of the lower court's ruling which expressly relied upon procedural default [did] *not require this court to speculate on what basis the state court denied petitioner's claim*." *Harmon*, 894 F.2d at 1273 (emphasis added). As a result, the *Harmon* Court held that "the policy considerations discussed in *Harris* are not compromised by applying the plain statement rule to the last state court that rendered judgment and provided reasons for the judgment." *Id.*

Unlike the Fourth, Fifth, Seventh and Eleventh Circuits, the court below failed to construe the plain statement requirement of *Harris* in a principled manner related to its genesis. In so doing, the Ninth Circuit has undermined the considerations of comity and concerns for the orderly administration of criminal justice that are so necessary in our federal system and serve as the basis for the procedural bar doctrine. *Francis v. Henderson*, 425 U.S. at 538-39.

Contrary to the Ninth Circuit's decision below, construction of the plain statement rule must be made in light of the reason for the rule, i.e., the clarification of ambiguity. Thus, it is beyond peradventure that the plain statement rule must not be applied to create an ambiguity where one did not exist such as when an appellate court, by its per curiam affirmance or denial of discretionary review, elects not to restate an unambiguous lower court ruling.

Petitioner respectfully requests this court to grant certiorari in order to resolve the split between the decision below, which is contrary to the interpretation of *Harris* that has been adopted by the four other circuits to have addressed this issue.

B. The Circuit Court's Decision Below Confuses The Exhaustion And Procedural Bar Doctrines And Improperly Interferes With The Orderly Operation Of The State Courts As Well As Undermines This Court's Procedural Bar Jurisprudence.

The decision below rested upon the alternative holding of judicial estoppel. That holding presents the question of

whether, in light of the plain statement requirement of Harris, the doctrine of judicial estoppel precludes the state from requesting dismissal of a first federal habeas petition for failure to exhaust, and then pursuing a procedural bar defense when the petitioner files a second federal habeas petition after having been procedurally barred in state court during the exhaustion process.

In *Wainwright v. Sykes*, *supra*, this court made it clear that the procedural default doctrine should not be confused with the exhaustion of state remedies doctrine which is a separate and distinct principle of law. *Id.*, 433 U.S. at 78-81. The exhaustion requirement is based upon considerations of federal-state comity which require that a federal court not upset a state court conviction without affording the state court the first opportunity to correct any alleged constitutional violation. *Picard v. Connor*, 404 U.S. 270 (1971). On the other hand, the procedural default doctrine, derived from the adequate and independent state ground principle of federalism, is designed to protect considerations of comity and concerns for the orderly administration of justice. *Francis v. Henderson*, 425 U.S. at 538-39.

When Russell filed his first federal habeas petition in the district court, it is undisputed that he had failed to previously present his claims to the Washington Supreme Court. After being dismissed without prejudice for failure to exhaust, Russell returned to state court, where his personal restraint petition was explicitly dismissed pursuant to the procedural bar rule of *In re Taylor*, 105 Wash.2d 683 (1986).[15] Thereafter, the Washington Supreme Court denied discretionary review of the court of appeals' decision

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[15]Russell was unsuccessful in convincing the state court that he met the "ends of justice" exception to the *Taylor* rule.

thereby leaving the unambiguous, plainly stated, procedural bar ruling of the court of appeals intact.[16]

Upon his return to federal court, it was undisputed that Russell's claims were exhausted. However, the district court found Russell's claims to be procedurally barred based upon the state court's unambiguous and plainly stated reliance on *In re Taylor, supra*. Russell then pursued the appeal that resulted in the Ninth Circuit alternatively holding that the state's "contrary" positions estopped them from asserting a procedural bar defense upon returning to federal court.[17]

The dissent below characterized the *Russell* decision as a "ruling [that] reflects so little regard for the legitimate interests of the state courts and state prosecutors, [that] it is certain to cause much mischief." *Russell*, 893 F.2d at 1041.

The dissent's characterization is both restrained and understandable because, in light of the majority's estoppel holding and its interpretation of *Harris*, the state's attorneys are faced with the choice of fulfilling their duty regarding exhaustion and then foregoing pursuit of a procedural bar defense in state court; or, foregoing their duty regarding exhaustion and then not giving the state court the opportunity to plainly state a procedural bar. Indeed, the dissent suggests it is incumbent that the court provide a map to assist the state in negotiating this course between Scylla and Charybdis. However, it is clear that there is no course through the alternative holdings of the court below.

Yet, there are two principled methods by which the Ninth Circuit could have ruled that support, rather than

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[16]In his ruling denying discretionary review, the Supreme Court Commissioner agreed that the Court of Appeals had properly applied *Taylor* and that Russell did not meet the criteria for the "ends of justice" exception to the *Taylor* rule. In addition, the Commissioner held that the state was not estopped from asserting the *Taylor* bar since the claims at issue were previously unexhausted and because Russell may well have fit into the "ends of justice" exception to *Taylor*. Thus the personal restraint petition was "available". *See* Appendix E.

[17]It should be noted that, although he had exhausted the estoppel argument, Russell abandoned that issue by failing to raise it in either the district court or in the court below on appeal.

derogate the exhaustion and procedural bar doctrines when a federal court is faced with unexhausted claims that may be procedurally barred. In the first, if the court is going to strictly construe the plain statement requirement of *Harris*, the petition must be dismissed in order to give the state court an opportunity to plainly state a procedural bar holding. In this way the federal court allows the state court to have the initial opportunity to rule upon the petitioner's federal claims as well as to plainly state a procedural bar.

The second method protects both doctrines, but does not involve a return to state court. Where a petitioner has failed to exhaust, but state law is clear that petitioner's claim would be procedurally barred, then the federal court does not dismiss for failure to exhaust. Instead, the federal court retains the case and moves to the "cause" and "prejudice" analysis of *Sykes*.

In adopting the second method, the Eleventh Circuit stated that it would be unreasonable to presume that the state court had waived petitioner's procedural default when it had never been given the opportunity to rule on the issue. *Parker v. Dugger*, 876 F.2d 1470, 1477-78 (11th Cir. 1989), *reversed and remanded on other grounds*, S. Ct. No. 89-5961 (Jan. 22, 1991). Relying upon and quoting from Justice O'Connor's concurrence in *Harris*, the *Parker* court reasoned:

> [It] would make no sense * * * [to] require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim.

Parker, 876 F.2d at 1478 (citing *Harris*, 109 S. Ct. at 1047 (O'Connor, J., concurring)).

Indeed, by failing to follow one of the two suggested methods, the Ninth Circuit's decision encourages the non-exhaustion of potentially barred claims. In so doing, the Ninth Circuit has provided state prisoners with a blueprint for circumventing state procedural requirements and has rewarded their recalcitrance with a federal forum where

they can pursue their claims unimpeded by valid state rules of procedure.

The opinion below improperly interferes with the orderly operation of the state courts and is a blatant attempt to undermine this Court's procedural bar jurisprudence by an inferior federal court. *See Russell*, 893 F.2d at 1039 (Kozinski, J. in dissent). The comity that is required in our federal system and which is enhanced by both the exhaustion and the procedural bar doctrines of this court, will be irreparably damaged if the decision below is left intact.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays that this court grant certiorari.

DATED this 25th day of February, 1991.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 88-3936
D.C. NO.
CV-87-1543-M

OPINION

LOUIS EUGENE RUSSELL,

Petitioner-Appellant,

V.

TOM ROLFS, SUPERINTENDENT,

Respondent-Appellee.

Appeal from the
United States District Court
for the Western District of Washington
Walter T. McGovern
District Judge, Presiding

Argued and Submitted
February 6, 1989--Seattle, Washington

Filed January 9, 1990

Before: Stephen Reinhardt, Alex Kozinski
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott;
Dissent by Judge Kozinski

SUMMARY

Criminal Procedure

Reversing the district court's denial of a writ of habeas corpus, the court held that petitioner's claim may not be procedurally barred from federal review after the Washington Supreme Court has reached the merits of the claim.

After a jury found appellant Louis Russell guilty of a

second-degree murder, first-degree attempted murder, and rape in the first degree. Russell appealed his conviction, raising issues regarding all three offenses. His convictions were affirmed by the Washington Court of Appeals, and Russell then sought review of his second-degree murder conviction in the Washington Supreme Court, raising only three of the seven issues argued before the court of appeals, but allegedly believing that all the issues he had argued previously were preserved for argument before the supreme court. After refusing to hear arguments on issues not included in his petition, the court reversed the second-degree murder conviction, but his convictions for rape and attempted murder remained intact. After numerous other unsuccessful attempts to appeal, Russell appealed the district court's dismissal of his habeas corpus petition. Although a United States Magistrate decided that the Washington Supreme Court had reached the merits of Russell's claims and that he was entitled to federal review on the merits, the district court found that the issues raised in the petition were waived by Russell due to a state procedural default. On appeal, Russell disputed this finding, arguing that the Washington Supreme Court reached the merits of his claims, and in the alternative, that a procedural barrier should not deny him relief. Russell also contended that sufficient cause and prejudice exist to entitle him to a federal hearing on the merits, and that the state should be estopped from raising the issue of procedural bar to deny him relief.

[1] The first issue the court addressed was whether the Washington Supreme Court, as the last state court rendering a judgment in the case, clearly and expressly relied on procedural default to deny Russell relief. [2] It was significant in the court's interpretation that the Washington Supreme Court decided not to exercise its discretionary power, as contrasted with refusing to hear Russell's case because of a procedural bar. [3] Russell's failure initially to petition the

supreme court for a hearing on the merits did not necessarily foreclose that court from considering in a later hearing the issues not raised in an earlier one, and it certainly did not automatically bar him from bringing them to its attention. The court concluded that there was no procedural default in this case merely because issues raised in a personal restraint petition had not been previously taken to the state supreme court on direct appeal from the court of appeals.

[4] Citing Judge Hall's dissent to *Religious Technology Center v. Scott*, 869 F.2d 1306 (9th Cir. 1989), the court noted that the doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. [5] Having persuaded the district court to deny Russell federal review on the ground that he had an adequate and available state remedy, the state cannot now be permitted to oppose Russell's petition for relief on the theory he was procedurally barred in state court. Because of contradictory positions taken by the state, the court held that the state is estopped from arguing in federal court that Russell's claims are procedurally barred.

Judge Kozinski dissented strongly in a separate opinion, stating that the federal habeas doctrines of exhaustion and procedural default are comity based, evincing a respect for state court judgments and an understanding that, in a federal system, the federal courts should not interfere when the states are taking care of their own business. The majority eroded these doctrines, ignoring the interests of the state of Washington.

COUNSEL

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John M. Jones, Assistant Attorney General, Corrections Division, Olympia, Washington, for the respondent- appellee.

OPINION

TROTT, Circuit Judge:

Louis Eugene Russell, a Washington state prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition. The district court found that the issues raised in the petition were waived by Russell due to a state procedural default. On appeal, Russell disputes this finding, arguing that the Washington Supreme Court reached the merits of his claim, and, in the alternative, that a procedural barrier should not deny him relief. Russell also contends that sufficient cause and prejudice exist to entitle him to a federal hearing on the merits, and he suggests that the state should be estopped from raising the issue of procedural bar to deny him relief. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I

The charges against Russell stemmed from a series of events which began when Russell was invited to the home of two strangers, Kenneth and Sherry Hanks. The evening ended with the death of Mr. Hanks, and with the severe stabbing and alleged rape of Mrs. Hanks.

Mrs. Hanks, the prosecution's main witness, testified that Russell killed her husband, raped her at knifepoint, and then stabbed her. Russell, testifying on his own behalf, related a different story. He alleged that Mr. Hanks invited him to a home to have intercourse with a "girl," who turned out to be Mrs. Hanks. Russell claimed that after he complied with the invitation, Mr. Hanks returned and became so enraged that he stabbed Mrs. Hanks and proceeded to attack Russell, who wrestled the knife away. Russell then testified that in self-defense he stabbed Mr. Hanks repeatedly, causing Mr. Hanks's death. Russell was apprehended while in flight from the victims' home.

The state charged Russell with first-degree murder, first-degree rape, and attempted rape. A jury acquitted him of the first-degree murder of Mr. Hanks. When the jury could not reach a verdict on the other two charges, a mistrial was declared. In a second trial, on amended charges, Rus-

sell was convicted by the jury of second-degree murder, first-degree attempted murder, and rape in the first degree. Consequently, Russell was sentenced to two concurrent maximum sentences of twenty years for attempted murder and rape while armed with a deadly weapon.

Russell appealed his conviction, raising issues regarding all three offenses. The Washington Court of Appeals affirmed his convictions. *State v. Russell*, 33 Wash. App. 579, 657 P.2d 338 (1983).

Russell then sought discretionary review of his second-degree murder conviction in the Washington Supreme Court. He raised only three of the seven issues argued before the court of appeals. Russell allegedly believed, however, that all the issues he argued before the Washington Court of Appeals were preserved for argument before the supreme court. After refusing to hear argument on issues not included in his petition, the court reversed the second-degree murder conviction and remanded for a new trial. His convictions of rape and attempted murder remained intact. *State v. Russell*, 101 Wash.2d 349, 678 P.2d 332 (1984). The state did not seek a retrial on the second-degree murder charge.

Russell next filed a petition for writ of habeas corpus seeking federal review of his two remaining state convictions. Russell raised three grounds for relief: (1) denial of the presumption of innocence in violation of the Fifth and Fourteenth Amendments; (2) denial of due process in violation of the Fifth and Fourteenth Amendments based on alleged prosecutorial misconduct; and (3) denial of the right to confront and cross-examine witnesses in violation of the Sixth and Fourteenth Amendments. Although these claims were argued before the court of appeals, they had not been raised in the petition before the Washington Supreme Court. The United States District Court denied without prejudice Russell's petition for failure to exhaust state remedies, apparently relying on the state's argument for dismissal based on the existence of an "*adequate and available*" remedy in state court through Washington's personal restraint petition procedure.

Russell then attempted—as apparently invited—to raise these issues before the Washington Supreme Court, but the state now took the position that he had no remedy by way of such a petition. The supreme court transferred the case to the Washington Court of Appeals which found Russell procedurally barred at that level because the issues were the same ones raised in his direct appeal to that court. On this basis, the court of appeals denied his personal restraint petition.

Russell next filed for discretionary review before the Washington Supreme Court, which, after stating that the court of appeals had not erred in concluding that Russell was procedurally barred from relitigating the issues in *that* court, declined to exercise its own discretionary jurisdiction.[1] The court additionally stated that an "ends of justice" exception that might have given him relief from his default was not available because the court of appeals' treatment appeared to be fully consistent with applicable case law.[2]

Russell then returned to federal court, raising in a second habeas corpus petition the same issues on which he had previously attempted to rely. The attorney general resisted his petition, arguing that Russell was procedurally barred from presenting his claim in federal court. A United States Magistrate decided that the Washington Supreme Court had reached the merits of Russell's claims; therefore, he was entitled to federal review on the merits. The district court disagreed, however, and dismissed the petition based on its interpretation of the final state court finding to the effect that Russell was procedurally barred from review. This appeal followed.

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[1] A fourth issue, which alleged a violation of the Constitution based on the cumulative effect of the first three violations, was also found to be procedurally barred by the court of appeals.

[2] Russell contends this statement constitutes a determination on the merits. The state responds that the statement is dicta, and no more than an application of the required "ends of justice" test.

II

This court reviews a district court's denial of a petition for writ of habeas corpus *de novo*. *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir.), *cert. denied*, 109 S. Ct. 403 (1988), 109 S. Ct. 1319 (1989); *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 380 (1988).

The district court determined there was no material fact in dispute as to whether Russell failed to comply with a reasonable state procedure and dismissed the petition. We disagree and conclude that under Washington law no procedural default occurred. In the alternative, we find the state is estopped from arguing Russell failed to exhaust his state remedies.

III

[1] The first issue we address is whether the Washington Supreme Court, as the "last state court rendering a judgment in the case," "clearly and expressly" relied on procedural default to deny Russell relief. *Harris v. Reed*, 109 S. Ct. 1038, 1043 (1989) (citations omitted). We find that it did not. The court's denial, as reflected in its commissioner's report dated July 24, 1987 and in the court's subsequent refusal to modify that report on October 6, 1987, was actually based on two distinct grounds. First, the court found no error in the state court of appeals' application of *In re Taylor*, 105 Wash.2d 683, 717 P.2d 755, 757 (1986),[3] agreeing that Russell's issues were procedurally barred in that intermediate court as having been previously "heard and determined." Second, the court elected not to exercise its discretionary power to review Russell's claims on the merits.

[2] It is significant in our interpretation that the Washington Supreme Court decided not to exercise its discretionary power—as contrasted with refusing to hear Russell's case because of a procedural bar—that the

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[3] *Taylor* only bars issues which have been "heard and determined" by the reviewing court. The record shows that Russell's present claims were not presented to the Washington Supreme Court as part of his direct appeal. Thus, the Washington Supreme Court, unlike the state court of appeals, cannot have rejected Russell's claims on *Taylor* grounds.

commissioner's report makes the following statement after its discussion of the *Taylor* issue:

> Further, the Court of Appeals' treatment in Mr. Russell's [initial] appeal of each of his three renewed legal issues still appears to be fully consistent with applicable case law. The more recent cases Mr. Russell cites do not change the governing rules of law. (Citations omitted).

In the procedural posture in which this matter found itself before the Washington Supreme Court, it cannot be said that this language is of little consequence. It is even reasonably susceptible of a conclusion that the supreme court not only was afforded the opportunity to address petitioner's constitutional claims, but in fact did so.[4] It is not, however, necessary to go that far to decide this case. It is sufficient to note that the "clear and express" statement relying on procedural default required by the Supreme Court in *Harris* before a petitioner will be barred from presenting his constitutional claims for federal review simply does not appear anywhere in this record.

The facts of this case are not unlike those involving one of the petitioners, Benjamin Malone, in *In re Lee*, 95 Wash.2d 357, 623 P.2d 687 (1980), *rev'd on other grounds sub nom. Hews v. Evans*, 99 Wash.2d 80, 660 P.2d 263 (1983). Malone, following his conviction of being a habitual criminal, appealed directly to the Washington Supreme Court. The court, in turn, transferred the appeal to the Washington Court of Appeals. Malone's appeal was based on several grounds, including the admission of a prior conviction based upon a guilty plea which Malone claimed was invalid. The court of appeals affirmed the habitual criminal conviction. Malone then petitioned the supreme court for discretionary review but did not include the prior conviction issue in his petition. The petition was denied.

Upon hearing Malone's subsequent collateral attack, the supreme court exercised its discretion in his favor and referred his personal restraint petition to the superior court to be heard on the merits, stating:

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[4] A magistrate is not limited in this way.

> We could, perhaps, hold that since he did not persist in his protest to the admissibility of the plea-based conviction in his petition for discretionary review to this court that he had abandoned the issue. We do not choose to do so. Malone did everything that any petitioner in *Holsworth*[5] did except prevail upon this court to examine his claim of error. He raised the issue in a timely manner, and most lucidly, in the trial court and again the Court of Appeals. Neither court recognized the validity of his contentions. While it may be said that it is not the function of a personal restraint petition to correct trial and appellate court mistakes, we think the error here, in light of *Holsworth*, to be too palpable to be disregarded.

In re Lee, 623 P.2d at 692.

[3] Following this logic, Russell's failure initially to petition the supreme court for a hearing on the merits did not necessarily foreclose that court from considering in a later hearing the issues not raised in an earlier one, and it certainly did not automatically bar him from bringing them to its attention. See *Hews v. Evans*, 99 Wash.2d 80, 660 P.2d 263 (1983). Guided by *Lee*, we cannot find a procedural default here merely because issues were raised in a personal restraint petition that had not been previously taken to the state supreme court on direct appeal from the court of appeals. This finding is not contrary to *Taylor*, relied on by the appellees. As noted earlier, *Taylor* only bars issues that have been "heard and determined" by the same reviewing court. 717 P.2d at 757.

We conclude that Russell's personal restraint petition to the Washington Supreme Court constituted exhaustion of state remedies. Accordingly, we reverse the decision of the district court.

IV

[4] In her dissent to *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (citation omit-

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[5] *State v. Holsworth*, 93 Wash.2d 148, 607 P.2d 845 (1980) held that in a habitual criminal proceeding, the defendant could challenge the use of a prior conviction based on a guilty plea to prove his habitual criminal status on the basis that the prior guilty plea was constitutionally defective.

ted), Judge Hall sets forth the principles underlying judicial estoppel:

> The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. *See* 1B *Moore's Federal Practice* [para.] .405[8], at 238-42 (2d Ed. 1988). "The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.'" *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985) (citations omitted). Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts."' *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988)(citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.
>
> * * * Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. *See generally* Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 410-12 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U.L. Rev. 1244 (1986).

During the first habeas proceeding in district court, the state argued federal review was not proper because Russell had "an adequate and available state court remedy through a Personal Restraint Petition," citing Washington Rules of Appellate Procedure 16.3 *et. seq.* Following the dismissal of his petition, Russell—not surprisingly—filed such a personal restraint petition in December 1986 in the Washington Supreme Court, which transferred it to the court of appeals. Once in state court, the state disregarded its previous representation in federal court and argued the petition was procedurally barred because Russell had

raised the same issues on direct appeal. Specifically, in a document entitled Response to Personal Restraint Petition filed on March 6, 1987 in the Washington Supreme Court, the state argued that "Russell's personal restraint petition should be dismissed because this petition [sic] raises the same legal basis for granting relief as did his appeal, the issues were decided on the merits against Russell, and now considering these same issues in his personal restraint petition would not serve the ends of justice." The document continues:

> The consideration of these issues at this time would not serve the ends of justice, especially since Russell has failed to provide any explanation for his failure to raise these issues when he had the opportunity three years ago. *To grant this type of collateral relief would undermine the finality of litigation, degrade the prominence of the trial, and cost society the right to punish an offender.* (Emphasis added).

This language is flatly inconsistent with the state's previous representation of June 5, 1986 in federal court that Russell's remedy in the state courts through the personal restraint petition procedure was presently "adequate and available." The word "available" as used in 28 U.S.C. § 2254(b) (requiring a petitioner first to exhaust available remedies in state court unless there exists an absence of corrective processes or "circumstances rendering such process ineffective to protect the rights of the prisoner") does not refer to an avenue that exists on a map but is closed permanently to the kind of vehicle being driven by the defendant. It does not include a door that has been forever sealed. This was highlighted by Justice O'Connor in her concurring opinion in *Harris*, when she said, "Thus, in determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner *a hearing on the merits* of his claim." 109 S. Ct. at 1046 (O'Connor, J. concurring, joined by The Chief Justice, and Scalia, J.) (emphasis added).

In the case *sub judice*, the federal district court was told not only that a remedy was "available" in state court, but that it was also "adequate." The use of these two adjectives in tandem was tantamount to advising the federal district court that Russell would be given a hearing in state court on the merits of his claims.

The dissent argues that if [we] apply judicial estoppel against the state in this case, we place state authorities in "quite a bind" by forcing them to choose between "violating federal law [requiring the state ". . . to advise the district court whether the prisoner has, in fact, exhausted all available state remedies", *Granberry v. Greer*, 481 U.S. 129, 134 (1987),] [][and] "ignoring their obligations under state law" [to present "a correct procedural default theory in state court"]. Dissenting op. at 221. We respectfully fail to see this "bind." The state's true position was that Russell did *not* fall within the *Taylor* exception. Thus, in the state's view, there was *no* remedy available to the defendant. The state should have told the district court that such was the state's view—not that the defendant *did* have an *adequate and available* remedy in the state courts. This strikes us not only as appropriate, but also easy and obvious. Certainly it does not put the state in a bind. The duty of states as described in *Granberry* to advise district courts as to whether state remedies have been exhausted is best met with candor, not misdirection. A state under these circumstances misleads a district court by mentioning only that portion of its views that favors the immediate result it seeks, and the upshot is to whipsaw the petitioner back and forth between two court systems.

We also disagree with the dissent's apparent view that estoppel does not bar a state from advancing a procedural argument in federal court that is contrary to the arguments it previously advanced in that court. The order of events in this regard strikes us as irrelevant. The dissent argues that there was a change in circumstances between the time of the first and second representations, i.e., the state courts had now spoken on the subject. Dissenting op. at 222. Of

course there was a change in circumstances! The state prevailed by telling the state court the opposite of what it told the federal court. The proposition that the state can be estopped from relying on the advantage it gained by doing so seems unremarkable.

Moreover, and with all respect to the Washington state courts, whether or not in their view the state was precluded from advancing an argument before them has scant bearing on whether the federal courts can protect the integrity of the federal system by preventing the state from taking advantage of a state decision it secured by telling the state court the opposite of what it told the federal court. Each court, state and federal, is entitled to have whatever rules of judicial estoppel it considers necessary to protect its dignity and its system of justice. That Washington may have a more limited or different view of judicial estoppel does not preclude us from determining what rule is appropriate for our purposes.

[5] Having persuaded the district court to deny appellant federal review on the ground that he had an "adequate and available" state remedy, the state cannot now be permitted to oppose appellant's petition for relief on the theory he was actually procedurally barred in state court.[6] Because of the contradictory positions taken by the state, we hold in the alternative that the state is estopped from arguing in federal court that Russell's claims are procedurally barred. The state's attempt to argue that its positions were not contradictory is not persuasive.

REVERSED and REMANDED for a determination on the merits.

KOZINSKI, Circuit Judge, dissenting:

Habeas corpus is, without doubt, one of the most complex and troubling areas of federal law. One can fairly debate whether the existing system of procedural bars and

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[6]The fact that the earlier representation was made by the attorney general's office and the latter by the King County prosecuting attorney is irrelevant—they were both speaking for the same party.

exhaustion requirements creates unnecessary obstacles and delays to federal review of prisoners' constitutional claims. Compare Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Committee Report and Proposal* (Judicial Conference of the United States, Aug 23, 1989), with Stephen Reinhardt, *Must We Rush the Executioner?*, L.A. Times B7 (Nov 7, 1989). As judges of an inferior federal court we are not in a position to make such judgments. These rules are established by Congress and by the Supreme Court; our obligation is to apply them. As they now stand, these rules place certain hurdles in the path of the federal habeas petitioner, hurdles put in place largely out of a respect for state interests. We may ignore neither these rules nor these interests.

Today the majority needlessly encroaches on the interests of the State of Washington, by allowing a challenge to a state conviction where the state had its own adequate and independent reasons for doing what it did. To make things worse, the majority blames the confusion on the state's lawyers, placing on them an unmeetable burden. Today's decision will only make more unmanageable an already delicate and difficult area of jurisprudence.

I

A. Under the procedural default doctrine of *Wainwright v Sykes*, 433 US 72, 87 (1977), when a petitioner is procedurally barred from bringing his federal claims in state court, he is also barred from federal habeas, absent a showing of "cause" for the default and "prejudice" to the petitioner as a result. As the Supreme Court reiterated last Term in *Harris v Reed*, 109 S Ct 1038, 1041-42 (1989), the procedural default rule is a subset of the "adequate and independent state ground" doctrine. Where the last state court to render judgment in a case upholds a conviction on an independent and adequate state ground—such as a procedural default—federal habeas is generally precluded. Id at 1043.

The rule of *Harris* is at the heart of this case. *Harris* held that, in order to find a procedural bar, the last state

court to render judgment must have "clearly and expressly" stated that its ruling rests on a state procedural default. Id. Here it is uncertain whether the last court to consider the issue was the Washington Court of Appeals or the Washington Supreme Court. The majority acknowledges that the state court of appeals based its decision on a procedural default. Majority op at 205. Thus, if the court of appeals was the last state court to render judgment in Russell's case, federal habeas is barred.[1]

I submit that the court of appeals indeed *was* the last state court to render a judgment in this case. The majority assumes, to the contrary, that the supreme court commissioner's ruling is the relevant decision for the application of *Harris*. But the commissioner's ruling is the work of one man, not himself a justice of the Washington Supreme Court. It is far from clear that this ruling is a decision by the supreme court; the justices did not adopt the ruling, they merely refused to modify it. Excerpts of Record (ER) 4-1. Moreover, I doubt the commissioner's ruling is properly considered a judgment. It is a "Ruling Denying Motion for Discretionary Review." ER 3-1. The majority bypasses both these issues, sub silentio equating a denial of supreme court review by a lone commissioner with a ruling on the merits by the supreme court. It seems to me much more likely that the last state court to have ruled on Russell's claims was the court of appeals. That court's order contains a clear statement that the petition is procedurally barred.

B. Even if we assume that the commissioner's ruling was a judgment (or that it was adopted verbatim by the supreme court), that decision is also sufficient to bar federal habeas. The majority concludes that the commissioner's ruling did not "clearly and expressly" rely on a state procedural default to deny Russell relief. The majority errs once again.

The court of appeals, relying on *In re Taylor*, 105 Wash2d 683, 717 P2d 755 (1986), held that Russell was

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[1] Absent a showing of cause and prejudice. See note 3 infra.

barred from bringing his claims via a personal restraint petition (PRP) because he had already presented those claims on direct appeal. Memorandum of Authorities in Support of Respondent's Motion for Summary Judgment, Exhibit 8. The commissioner's ruling affirmed the court of appeals' application of *Taylor*. ER 3-1 to 3-3. *Taylor* held that a PRP should be dismissed if the petitioner's claims had already been rejected on direct appeal, unless the "ends of justice" would be served by hearing the claim. 717 P2d at 758. This is a procedural default rule. By affirming its application to Russell's case, the commissioner clearly and expressly stated that a procedural bar was at least one basis for his ruling.[2]

As part of his *Taylor* analysis,[3] the commissioner considered whether the "ends of justice" exception should apply. He discussed and rejected two theories—one factual and one legal—that might entitle Russell to such an exception. First, the commissioner found that there was no new

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[2]And one basis is all that is needed. In *Harris*, the Supreme Court held that procedural bar need not be the sole basis for the state court judgment. The Court explained:

> [A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when th state court also relies on federal law. Thus,I by applying this doctrine to habeas cases, Mi'es curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.

Harris, 109 S. Ct. at 1044 n. 10 (emphasis original; citation omitted).

[3]The majority is under the misapprehension that the commissioner did not apply *Taylor* at all. "*Taylor* only bars issues which have been 'heard and determined' by the reviewing court." Majority op at 206 n 3. Since the Washington Supreme Court never heard Russell's claims on direct appeal, that court could not have rejected Russell's PRP on *Taylor* grounds, the majority reasons. The commissioner's reference to *Taylor*, the majority concludes, was merely an affirmation that *the court of appeals*—a court that had heard and determined Russell's previous appeal—had properly applied a procedural bar. Majority op at 206.

The majority's interpretation of *Taylor* is refuted by the facts of that case. In *Taylor*, a Washington Supreme Court case, the supreme court had *not* heard and determined Taylor's case on direct review; only the court of appeals had affirmed his conviction. 717 P2d at 757. Yet the supreme court had no difficulty framing the issue before them as "whether Taylor's PRP raises issues which *this court* may consider on collateral review." Id (emphasis added). It was in this context that the Washington Supreme Court held that an issue previously heard and determined on direct review in any Washington court will normally bar collateral review, absent an "ends of justice" exception. Id at 757-58. I don't understand how the majority can conclude that the *Taylor* procedural bar applies only to courts that had previously heard and determined a direct appeal.

evidence in the case sufficient to constitute a "colorable showing of factual innocence." ER 3-3 (quoting *Kuhlmann v Wilson*, 477 US 436 (1986)). Next, he concluded that "each of [Russell's] three renewed legal issues still appears to be fully consistent with applicable caselaw." ER 3-3.

In *Taylor*, the Washington Supreme Court explained that one example of an ends of justice exception is "an intervening change in the law." 717 P2d at 758. The majority construes the commissioner's "applicable caselaw" statement as an independent determination of Russell's claims. Majority op at 6-7. But even the most cursory reading of *Taylor* reveals that this is not so. The "applicable caselaw" inquiry is an integral part of the *Taylor* analysis; the commissioner's discussion tracks that analysis precisely. The commissioner was not performing an independent substantive review of Russell's claims; he was doing only what *Taylor* said was required in determining that Russell's petition was procedurally barred. His decision was "clearly and expressly" based on an affirmation of the court of appeals' procedural ruling.

The majority's reliance on *In re Lee*, 95 Wash2d 357, 623 P2d 687 (1980), overruled in part, *Hews v. Evans*, 99 Wash2d 80, 660 P2d 263 (1983), is puzzling. I can only assume that the majority cites *Lee* to demonstrate that the Washington Supreme Court has not consistently applied the rule of *Taylor*. It is true that a state procedural default is not adequate to bar federal habeas unless the procedural rule has been "consistently or regularly applied." *Johnson v Mississippi*, 108 S Ct. 1981, 1987 (1988). The Court has explained that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v Lovorn*, 457 US 255, 263 (1982). This federal habeas rule is not relevant here because Lee and this case represent consistent applications of the *Taylor* rule.

As noted, the Washington Supreme Court in *Taylor* held that a PRP should be dismissed if the petitioner's claims had already been rejected on direct appeal and the "ends of justice" would not be served by hearing the claim.

717 P2d at 758. In defining that phrase, the court explained that "an intervening change in the law" might justify collateral review. Id. Despite the difference in outcome, Lee and this case both follow this rule.

Malone and Russell were not treated similarly because they did not present "similar claims." *Hathorn*, 457 US at 263. *Lee* allowed collateral review of Malone's conviction because there had been a change in relevant state law since the time of his direct appeal, namely *State v Holsworth*, 93 Wash2d 148, 607 P2d 845 (1980). *Lee*, 623 P2d at 691-92. In this case, both the court of appeals and the commissioner held that Russell's PRP was barred because he had already raised the issues on direct appeal and there had been no intervening change in the relevant law. Memorandum of Authorities in Support of Respondent's Motion for Summary Judgment, Exhibit 8; ER 3-3. Thus, the Washington Supreme Court has applied its procedural default rule consistently, allowing collateral review of previously adjudicated claims only if there has been a change in relevant law or another "ends of justice" exception applies. There was an independent and adequate state procedural ground to bar federal habeas.[4]

II

Serious as is the majority's error as to procedural bar, it pales by comparison to its alternative ruling regarding judicial estoppel. This ruling reflects so little regard for the legitimate interests of the state courts and state prosecutors, it is certain to cause much mischief.

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[4]Once procedural bar is established, a petitioner's only recourse is to show cause and prejudice. *Wainwright*, 433 US at 87. Russell argues that the cause for his failure to raise all issues on direct appeal to the Washington Supreme Court was error by his attorney. Petitioner's Opposition to Motion for Summary Judgment at 3 (Dec 29, 1987). The Supreme Court has held that for attorney error resulting in procedural default to amount to cause, the error must rise to the level of constitutionally ineffective assistance of counsel. *Murray v Carrier*, 477 US 478, 488 (1986). Such a claim, as it presents a constitutional question, must itself be raised and exhausted in state court before it may be used to establish cause for a procedural default. Id at 489. There has been no showing that Russell ever presented this claim to the state courts. Thus, at best, Russell must go back to state court to present his ineffective assistance of counsel claim before he could attempt to get around the procedural bar on his other claims.

As there is no showing of cause, the presence of actual prejudice is irrelevant.

A. What is most baffling about the majority's analysis of judicial estoppel is that it is flatly inconsistent with its analysis of procedural bar. In section III of its opinion, the majority finds it at least arguable that the commissioner in fact addressed Russell's constitutional claims on the merits. Majority op at 207. The majority also concludes that a priori there was a good possibility that the Washington Supreme Court would hear Russell's PRP:

> Russell's failure initially to petition the supreme court for a hearing on the merits did not necessarily foreclose that court from considering in a later hearing the issues not raised in an earlier one, and it certainly did not automatically bar him from bringing them to its attention.

Majority op at 208. How then, in section IV of its opinion, can the majority conclude that the state of Washington misled the district court at the first habeas hearing by arguing that Russell had an "available" state remedy?

On the first habeas petition, the state argued that Russell had failed to exhaust because he had a remedy available in state court. This argument was not merely successful, it was right. More than that, under Supreme Court caselaw, the state was *required* to make this argument: "When the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies." *Granberry v Greer*, 481 US 129, 134 (1987).

As the majority points out, at the time Russell brought his first habeas petition in federal court there was a good chance that he could get the Washington Supreme Court to hear his claims via a PRP. Majority op at 208. This fact alone required the district court to dismiss Russell's habeas petition. Moreover, under *Granberry*, the State of Washington had the obligation to make the argument for nonexhaustion based on the availability of that procedure. The state, therefore, did precisely what it was supposed to do.

The majority believes that the prosecutor overreached in characterizing the state procedure as "available," because that term suggested to the district court that Russell's

claims would in fact be heard on the merits via a PRP. Majority op at 211. But under our caselaw, when a petitioner has not previously presented his claims to the state's highest court, a procedure is "available" for purposes of the exhaustion requirement even if it is discretionary and contingent. *Batchelor v. Cupp*, 693 F2d 859, 863 (9th Cir 1982). That was the case here. Under *Taylor*, Russell still had the live possibility that the state supreme court would consider his claim. The prospect of this state remedy—remote though it may have been—was enough to bar a federal habeas petition. Id. The procedure therefore *was* "available" as that word is normally understood in the exhaustion context. The majority does the state an injustice by interpreting its use of "available" far more broadly than the term is used in our own cases. The unfairness is particularly great because, under *Granberry*, the state authorities were required to point out to the district court that the availability of this remedy precluded federal habeas.

In any event, I don't understand the majority's fixation with the particular adjective employed by the state in describing the state PRP procedure. Given the way the PRP process *actually operates* in the State of Washington, it is quite clear that the district court was required to dismiss Russell's first petition. It would have made no difference—none—if the state had said "contingently available" or"possibly available" or "maybe available" or "available for immediate occupancy." The outcome would have been just the same. In fact, the language the state used—"adequate and available"—is a fair and accurate description of the situation in light of our caselaw as to what amounts to available.

Back in state court after the first habeas dismissal, the state did not argue that there was absolutely no avenue of review open to Russell, an argument that might have been inconsistent with the state's representation in federal court; it argued only that the state courts should not exercise their discretion in giving Russell the benefit of the narrow *Taylor* exception. The majority apparently views *this* argument as inconsistent with the state's prior argument in federal dis-

trict court. But where is the inconsistency? There is a significant difference between arguing that there are state procedures available to petitioner, as the state was required to do, and actually helping him succeed once he avails himself of those procedures. As I see it, the state was well within the bounds of accepted practice in arguing before the state courts that Russell did not fall within the *Taylor* exception.

The majority places the state authorities in quite a bind: state lawyers must choose between violating federal law or ignoring their obligations under state law. Under the majority's analysis, if the state makes its required showing of nonexhaustion in federal court, it is precluded from presenting a correct procedural default theory in state court. However the state's lawyers resolve this dilemma, they would not be doing their jobs. After taking the state authorities to task for what they supposedly did wrong, it would be helpful if the majority would explain how the state should have done it differently. If we are going to make lawyers negotiate a path between Scylla and Charybdis, we might be well advised to give them a map.

B. In any event, I don't understand how the federal courts can complain about any inconsistency in the state's litigating position. Estoppel operates forward, not backward. If there was an inconsistency between the state's initial representation in federal court and its later assertions in state court, the first argument could estop the second, but the second could not estop the first. Thus, estoppel could apply only in the state court proceedings. Russell in fact argued estoppel, but the state courts rejected the claim and went on to find a procedural default. It was exclusively within the province of the state courts, it seems to me, to decide whether they would refuse to reach the merits of the prosecutor's arguments because the prosecutor had changed positions upon returning from federal court.

As the majority explains, judicial estoppel is an equitable doctrine designed to protect the dignity of judicial proceedings. See Majority op at 208, quoting *Religious*

Technology Center v Scott, 869 F2d 1306, 1311 (9th Cir 1989) (Hall dissenting); *Arizona v Shamrock Foods Co.*, 729 F2d 1208, 1215 (9th Cir 1984). If the Washington state courts did not feel their institutional interests were impugned by considering the state's procedural default argument, what business is it of ours? By holding that the state was precluded from making the procedural default claim, the majority is telling the state courts that they were wrong to reach the claim and hold that there was a default. Quite simply, the majority is second-guessing the state courts on a question of state law.

The majority cannot avoid that conclusion by arguing that the state took inconsistent positions in the two federal court proceedings. In the first place, that is not in fact what the opinion relies on; the majority reviles the state for what it said in *state* court subsequent to its representation in federal court. Majority op at 209.

Moreover, there is no inconsistency between the positions the state took in its two appearances in federal court because there had been a material change in circumstances in the interim. The first time, the state claimed that Russell had failed to exhaust state remedies because state processes were still open to him. That assertion was entirely true. The second time, the state argued that, in light of the intervening ruling of the state courts, Russell was procedurally barred. That was equally true. The two arguments are indeed different, but they were made at different times, one before and one after the state courts had spoken on the question of procedural default. How the majority can invoke judicial estoppel under these circumstances is beyond me.

C. Finally, it is irrelevant what the majority thinks about judicial estoppel; that question is res judicata between the parties. Russell specifically raised the question before the state courts. The court of appeals rejected the claim, albeit without discussion. Memorandum of Authorities in Support of Respondent's Motion for Summary Judgment, Exhibit 8. Of course, the court's failure to discuss the claim is not material; what counts is that it could not have

reached the decision it did without rejecting the judicial estoppel claim. See *Block v Commissioners*, 99 US 686, 693 (1878); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18 *Federal Practice and Procedure* § 4421 at 193 (West, 1981).

The state supreme court was more explicit. Assuming that the commissioner's ruling became the opinion of the court, the court directly addressed and rejected the judicial estoppel claim:

> On the estoppel issue, I am not persuaded that the State acted improperly in taking the positions it did in the two proceedings. Since Mr. Russell's petition for review addressed only his murder conviction, and since this court did not expand the scope of review upon granting the petition, the issues he raised on appeal regarding the other two convictions were not before this court. RAP 13.7(b). The State correctly represented this exhaustion problem in the federal habeas action. Also, since Washington courts will, upon a sufficiently compelling showing, consider renewed claims in a personal restraint petition, *In re Taylor*, *supra*, the State in its federal court pleadings accurately described the state remedy as "available." I do not believe this somehow bound the State not to contest whether Mr. Russell could later make the requisite showing, however. Moreover, it seems questionable whether the *Taylor* rules need even be affirmatively raised by the State in order for the court to apply them.

ER 3-2 to 3-3. Having twice raised the claim of judicial estoppel in judicial proceedings and having had it rejected, Russell may not again raise it before us; it is res judicata. See *St. John v Wisconsin Employment Relations Bd.*, 340 US 411 (1951); *Abramson v University of Hawaii*, 594 F2d 202, 207 (9th Cir 1979).

CONCLUSION

The federal habeas doctrines of exhaustion and procedural default are comity based; they evince a respect for state court judgments, and an understanding that, in a federal system, the federal courts should not interfere when the states are taking care of their own business. Today, the

majority erodes these doctrines, ignoring the interests of the State of Washington. The majority achieves this result by misconstruing the actions of the Washington courts, and overruling a state court judgment that is res judicata between the parties. Adding insult to injury, the majority takes the Washington state lawyers to task for doing exactly what they were supposed to do. I respectfully dissent.

APPRENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-3936
D.C. NO. CV-87-1543-M

LOUIS EUGENE RUSSELL,

Petitioner-Appellant,

v.

TOM ROLES, *Superintendent,*

Respondent-Appellee.

Before: REINHARDT, KOZINSKI, and TROTT, Circuit Judges.

Judges Reinhardt and Trott have voted to deny the petition for rehearing filed in this case. Judge Kozinski has voted to grant the petition for rehearing.

The panel has unanimously voted to reject the rehearing en banc suggestion.

The full court has been advised of the suggestion to rehear this case en banc, and no judge has requested a vote on the issue. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPRENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C87-1543M

LOUIS EUGENE RUSSELL,

Petitioner,

v.

TOM ROLFS,

Respondent.

THIS MATTER comes on for consideration by the undersigned Judge of the above-entitled Court upon the respondent's motion for summary judgment dismissing the above-numbered petition for federal habeas relief.

In 1980 in the superior court of the State of Washington in and for the County of King, petitioner Russell was acquitted of a charge of first degree murder, the jury finding it impossible to reach a verdict on the remaining charges of first degree rape and attempted murder in the first degree. In a second trial Russell was convicted of murder in the second degree, attempted murder in the first degree (while armed with a deadly weapon) and first degree rape.

The Washington Court of Appeals in cause No. 9735-1-I, affirmed. The Washington Supreme Court reversed the second degree murder conviction and remanded for a new trial on that charge. The State declined to retry petitioner on that count.

Russell in cause No. C86-451R then sought federal habeas relief from his attempted murder in the first degree and first degree rape convictions. Because Russell raised issues in C86-451R which he did not raise before the Washington Supreme Court, Chief Judge Rothstein dismissed his petition for failure to exhaust his state remedies.

Russell then filed a personal restraint petition with the Washington Court of Appeals seeking to raise the is-

sues Chief Judge Rothstein found not to have been exhausted. The Court of Appeals dismissed because the petitioner concededly had raised those issues previously on direct appeal in cause No. 9735-1-I. The Court of Appeals *inter alia* said:

> However, as petitioner concedes in his petition, he raised the same issues before this court on direct appeal in Cause No. 9735-1-I. (reference omitted.) Because there has been no substantial change in the law on these issues which might call into question the legal reasoning of this court's decision in Cause No. 9735-1-I and the Supreme Court reversed a different part of the decision, he is barred from raising the issues again on collateral review. (citations omitted.)

In addition, the Court of Appeals denied petitioner's fourth issue as merely cumulative of the procedurally barred issues.

Russell then filed a motion for discretionary review with the Washington Supreme Court. He again raised the same three issues which Chief Judge Rothstein found Russell had not exhausted and the Washington Court of Appeals found he was procedurally barred from relitigating. The Washington Supreme Court upheld the Court of Appeals on the authority of *In re Taylor*, 105 Wn.2d 683, 687-88 (1986), and denied the motion for discretionary review. Petitioner then filed the instant petition for writ of habeas corpus.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) then Justice Rehnquist in delivering the opinion of the Court, at 81-82 brought to a focus the question presented here.

> The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its *procedural* rules. The adequacy of such an independent state procedural ground to prevent federal habeas review of the underlying federal issue has been treated very differently than where the state-law ground is substantive. The pertinent decisions marking the Court's somewhat tortuous efforts to deal with this problem are: *Ex parte Spencer*, 228 U.S. 652 (1913); *Brown v. Allen*, 344

> U.S. 443 (1953); *Fay v. Noia*, *supra*; *Davis v. United States*, 411 U.S. 233 (1973); and *Francis v. Henderson*, 425 U.S. 536 (1976). (Emphasis in original.)

The Supreme Court's holding in *Wainwright v. Sykes*, *supra*, is set forth at 87:

> We thus come to the crux of this case. Shall the rule of *Francis v. Henderson*, *supra*, barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer in the affirmative.

The application of the state procedural default doctrine requires the same result in the case at bar, the petitioner's argumentation to the contrary notwithstanding.

The Supreme Court Commissioner's Order of July 24, 1987 which directly denied the petitioner's motion for discretionary review of his personal restraint petition unfortunately but transiently mentioned the lack of merit to each of the three renewed legal issues. That reference was dicta and nothing more than an off-hand observation that the facts and law of the case would not require an application of the "cause" and "prejudice" exception to the *Francis v. Henderson* rule in order to avoid an actual miscarriage of justice.

No fact material to the petitioner's failure to comply with a reasonable state procedure being in dispute, respondent is entitled as a matter of law to a judgment dismissing the petition. NOW THEREFORE,

IT IS ORDERED that respondent's motion for summary judgment dismissing the petition for relief under 28 U.S.C. 2254 be and the same is hereby GRANTED.

The Clerk shall enter judgment consistent with this Order an direct uncertified copies of the Order and Judgment to petitioner, to the Attorney General of the State of Washington and to the United States Magistrate.

WALTER T. MCGOVERN
United States District Judge

APPRENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

NO. 20075-5-I

ORDER DISMISSING PERSONAL RESTRAINT PETITION

In the Matter of the Personal Restraint Petition of:

LOUIS EUGENE RUSSELL,

Petitioner.

Petitioner Louis Eugene Russell has filed a personal restraint petition in which he seeks relief from his convictions of attempted murder in the first degree and rape in the first degree in King County Cause No. 80-1-02035-4. However, as petitioner concedes in his petition, he raised the same issues before this court on direct appeal in Cause No. 9735-1-I[1]. 1 *State v. Russell*, 33 Wn. App. 579, 657 P.2d 338 (1983), *aff'd in part, reversed in part*, 101 Wn.2d 349, 678 P.2d 332 (1984). Because there has been no substantial change in the law on these issues which might call into question the legal reasoning of this court's decision in Cause No. 9735-1-I and the Supreme Court reversed a different part of the decision, he is barred from raising the issues again on collateral review. *In re Taylor*, 105 Wn.2d 683, 687-88, 717 P.2d 755 (1986); *see also In re Haverty*, 101 Wn.2d 498, 502-03, 681 P.2d 835 (1984); *State v. Stockman*, 70 Wn.2d 941, 947, 425 P.2d 898 (1970). Now, therefore, it is hereby

---

[1] Although the fourth issue raised by petitioner, *i.e.*, that the cumulative [sic] effects of issues one through three denied petitioner a fair and impartial trial in violation of the state and federal constitutions, has technically not been raised before, the three underlying issues have all been raised, considered and rejected by this court on direct appeal. Without a ground to stand on, the fourth issue also collapses.

ORDERED that the personal restraint petition is dismissed.

Done this 15th day of April, 1987.

_____

Acting Chief Judge

APPRENDIX E

THE SUPREME COURT OF WASHINGTON

NO. 20075-5-I

RULING DENYING MOTION FOR DISCRETIONARY REVIEW

In the Matter of the Personal
Restraint Petition of:

LOUIS EUGENE RUSSELL,

Petitioner.

In this personal restraint proceeding, Louis Eugene Russell challenges convictions for first degree rape and attempted murder. In an order dated April 15, 1987, the Acting Chief Judge of Division One of the Court of Appeals dismissed the petition on the ground that the same legal issues had been raised in Mr. Russell's direct appeal and there rejected. See *In re Taylor*, 105 Wn.2d 683, 687-88, 717 P.2d 755 (1986). Mr. Russell now moves for discretionary review. For the reasons discussed below, I conclude that review must be denied.

Mr. Russell was convicted in 1980 of second degree murder, first degree rape, and attempted first degree murder. On appeal he raised several issues, including (1) improper limitation of his cross-examination of a prosecution witness, (2) prejudicial conduct by a deputy sheriff during trial, and (3) improper rebuttal argument by the prosecuting attorney. *State v. Russell*, 33 Wn. App. 579, 587-89, 657 P.2d 338 (1983), *modified*, 101 Wn.2d 349, 678 P.2d 332 (1984). The Court of Appeals found no merit in these or any of Mr. Russell's other arguments and upheld all of his convictions. He then filed a petition for review to this court, in which he argued only that he had been improperly charged with the second degree murder. This court granted review and reversed the murder conviction. *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984).

Mr. Russell later filed a habeas corpus petition in United States District Court, challenging his rape and attempted murder convictions. The State moved to dismiss, arguing that Mr. Russell had not exhausted his available state remedies because he had failed to challenge those convictions in his petition to this court. The district court agreed and in September of 1986 dismissed the habeas corpus petition without prejudice.

In December of 1986, Mr. Russell filed the present personal restraint petition raising the three issues enumerated above and, as a fourth issue, the cumulative effect of the first three errors. In response to the petition, the State argued that Mr. Russell should not be permitted to relitigate the issues he raised on direct appeal. Mr. Russell countered that the State should be estopped from taking this position because it was inconsistent with the contention made in the federal proceedings. The Chief Judge agreed with the State and dismissed the petition based on *In re Taylor, supra*, as noted above. The Chief Judge did not address the estoppel argument. In the instant motion, Mr. Russell again urges estoppel and also argues that *Taylor*, properly applied, should not preclude addressing (and granting relief on) his claims on the merits.

On the estoppel issue, I am not persuaded that the State acted improperly in taking the positions it did in the two proceedings. Since Mr. Russell's petition for review addressed only his murder conviction, and since this court did not expand the scope of review upon granting the petition, the issues he raised on appeal regarding the other two convictions were not before this court. RAP 13.7(b). The State correctly represented this exhaustion problem in the federal habeas action. Also, since Washington courts will, upon a sufficiently compelling showing, consider renewed claims in a personal restraint petition, *In re Taylor, supra*, the State in its federal court pleadings accurately described the state remedy as "available." I do not believe this somehow bound the State not to contest whether Mr. Russell could later make the requisite showing, however. Moreover, it

seems questionable whether the *Taylor* rules need even be affirmatively raised by the State in order for the court to apply them.

Mr. Russell's reliance on the "ends of justice" exception of Taylor is similarly unavailing. Having read all of the pleadings in this court and the Court of Appeals, I find nothing new that would support his assertion of a "colorable showing of factual innocence." See *Kuhlmann v. Wilson*, ___ U.S. ___, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986).

Further, the Court of Appeals' treatment in Mr. Russell's appeal of each of his three renewed legal issues still appears to be fully consistent with applicable caselaw. *See State v. Russell, supra* 33 Wn. App., at 587-89. The more recent cases Mr. Russell cites do not change the governing rules of law.

Finally, although Mr. Russell did not raise the cumulative error issue on appeal, he did challenge each of the identified errors individually. Treating the cumulative error issue as a new one, without some basis for relitigating the individual claims, would make no sense under *Taylor*.

In sum, Mr. Russell has not shown that the Acting Chief Judge erred by dismissing his personal restraint petition or that review is otherwise merited under RAP 13.5(b). The motion for discretionary review is therefore denied.

DATED at Olympia, Washington this 24th day of July, 1987.

Geoffrey Crooks
COMMISSIONER

APPRENDIX F

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of cicumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; or

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the

applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

NO. 90-1370

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TOM ROLFS, Superintendent,
Petitioner,
v.
LOUIS EUGENE RUSSELL,
Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Louis Eugene Russell, through counsel, moves pursuant to Supreme Court Rule 39 for leave to proceed in forma pauperis. The undersigned counsel was appointed by the United States Court of Appeals for the Ninth Circuit under the Criminal Justice Act. Mr. Russell was granted leave to proceed in forma pauperis by the United States District Court on June 24, 1988.

DATED: March 29, 1991.

Respectfully submitted,

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Attorney of Record for
Respondent Louis Eugene
Russell

NO. 90-1370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TOM ROLFS, Superintendent,

Petitioner,

v.

LOUIS EUGENE RUSSELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of Record for
Respondent

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NO. 90-1370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TOM ROLFS, Superintendent,

Petitioner,

v.

LOUIS EUGENE RUSSELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Louis Eugene Russell respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 893 F.2d 1033 (9th Cir. 1990).

OPINIONS BELOW

The Petitioner does not list, or reference anywhere in its Petition, the Washington Supreme Court's Order Denying Motion To Modify Commissioner's Ruling. That order appears as Appendix A hereto. The Commissioner's Ruling to which it refers is Appendix E to the Petition.

JURISDICTION

Respondent agrees with Petitioner's jurisdictional

statement.

STATEMENT OF THE CASE

The Petitioner has omitted several facts of significance, and so the case is restated fully here.

Respondent Louis Eugene Russell was originally charged in 1980 in Washington State court with first degree murder, rape in the first degree, and attempted murder in the first degree. The charges stemmed from a strange series of events which began when Mr. Russell, a career soldier with a spotless record who was stationed at Fort Lewis, Washington, was invited by a stranger, Kenneth Hanks, to come to the Hanks apartment. The events ended with Kenneth Hanks dead and his wife, Sherry, having been stabbed and, she testified, raped. Mr. Russell admitted being in the house, but testified that after he had consensual sex with Sherry Hanks at Kenneth Hanks' urging, Kenneth Hanks became enraged, stabbed Sherry Hanks, and attacked Mr. Russell, who wrestled the knife away and stabbed Hanks in self defense. State v. Russell, 33 Wn. App. 579, 657 P.2d 338, 341 (1983), reversed in part, 101 Wn.2d 349, 678 P.2d 332 (1984). The case turned on Mr. Russell's credibility versus that of Sherry Hanks. There were no other eyewitnesses, and the jury was left to consider "conflicting stories and inconsistent physical evidence." State v. Russell, 101 Wn.2d at 350, 678 P.2d at 334. Mr. Russell has always maintained his innocence of the charges against him.

In his first trial in July of 1980, Mr. Russell was acquitted of the charge of first degree murder. The jury was

unable to reach a unanimous decision, with the split being 7 to 5 for acquittal, on the lesser included offense of second degree murder and on the charges of first degree rape and attempted murder in the first degree. CR 1 below, p. 8.

In August, 1980 Mr. Russell was re-charged, this time with one count of intentional murder in the second degree, one count of attempted murder in the first degree, and one count of rape in the first degree. Later, Mr. Russell was re-arraigned on a second amended information, which contained two alternative second degree murder theories: added to the intentional murder charge was the charge of felony murder, in addition to the other counts of rape in the first degree and attempted murder in the first degree. The second jury trial on this amended information resulted in conviction as to all three counts. State v. Russell, 101 Wn.2d at 350-351, 678 P.2d at 334.

Mr. Russell prosecuted a state appeal. The State Court of Appeals affirmed his conviction in early 1983. State v. Russell, supra, 33 Wn. App. at 592, 657 P.2d at 346. The Washington Supreme Court, however, reversed Mr. Russell's conviction for second degree murder and left intact his other convictions. State v. Russell, supra, 101 Wn.2d at 354, 678 P.2d at 336. The state elected not to retry Mr. Russell on the second degree murder charge which had been reversed, and accordingly he was sentenced in 1984 to his current sentences for rape and attempted murder.

Mr. Russell's counsel did raise the issues now raised in the

federal habeas corpus petition in the Washington Court of Appeals on direct appeal. That court specifically ruled on those issues, but denied relief. State v. Russell, supra, 33 Wn. App. at 588-591, 657 P.2d at 344-346.[1]

Mr. Russell's counsel then filed a Petition For Review in the Washington Supreme Court. Although he did not specifically include in the petition for review the issues now raised in the federal habeas petition, he believed that the filing of the petition for review brought all issues raised in the Court of Appeals before the Supreme Court, and he intended that all such issues be before that court. See counsel's declaration, attached as Exhibit 2 to CR 9, below. Indeed, because of this belief, counsel attempted to argue all issues -- including those underlying the habeas petition in this case -- before the Washington Supreme Court,[2] but was instructed by the court to limit argument to the issues delineated in the Petition For Review. Id. The Washington Supreme Court, pursuant to Washington Rule of Appellate Procedure ("RAP") 13.7(b), determined only the issues specifically identified in the

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[1]/ The claims he raises allege denial of the benefit of the presumption of innocence by the actions of a jail guard in apprehending Mr. Russell in front of the jury when the trial court called him to the bench; denial of due process due to improper prosecutorial argument; and violation of the cross-examination component of the Sixth Amendment's confrontation claus. Habeas petition, CR 1 below.

[2]/ Therefore, the issues were hardly "abandon[ed]" (Petition at 3). No court has ever called the issues abandoned at any stage.

petition for review. State v. Russell, 101 Wn.2d at 350-355, 678 P.2d at 334-336.

Mr. Russell, with the assistance of present counsel, then filed his first petition for writ of habeas corpus in the federal district court, raising the constitutional claims now raised in the present case. The State in the first federal habeas corpus case moved for dismissal of the petition, claiming that Mr. Russell had not presented his claims to the Washington Supreme Court; the State specifically said that:

> Petitioner Russell has an adequate and available remedy in the State courts through the personal restraint petition procedure, Washington Rules of Appellate Procedure (RAP) 16.3 et seq.

Memorandum in Support of Motion to Dismiss, p. 10, in Russell v. Ducharme, No. C86-451R, attached as Exhibit 1 to CR 9 below (emphasis added). Mr. Russell opposed the motion, arguing that his counsel had in fact raised the issues at argument before the Washington Supreme Court. But based on the State's assertions, the Federal District Court dismissed without prejudice his habeas petition so that Mr. Russell could file a Personal Restraint Petition, as the State had suggested. CR 10 below, p. 4.

Mr. Russell next duly filed a Personal Restraint Petition in the Washington Supreme Court asking that court to consider his federal constitutional claims, as the State asserted in federal court he could do. Ex. 3 to CR 9. Next the State, now taking the opposite position, filed its response in the Washington Supreme Court claiming that Mr. Russell could not seek relief by

way of such a petition. Response To Personal Restraint Petition, quoted in Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The Washington Supreme Court transferred the case to Division I of the Washington Court of Appeals.[3] The Chief Judge of that court stated in a summary order that because the issues had been previously adjudicated in Mr. Russell's direct appeal, they would not be heard again in the Court of Appeals. Appendix D to the Petition herein.

Mr. Russell then filed a Motion For Discretionary Review in the Washington Supreme Court. This Motion is attached as an Exhibit to CR 7 below. Mr. Russell argued that the State was estopped from asserting that he did not have a remedy, given that the State had represented to the federal court that a remedy was available to him to have his issues addressed by the Washington Supreme Court. Alternatively, Mr. Russell argued that in any event his issues should be heard on the merits, for both equitable and legal reasons.

The Washington Supreme Court responded as follows. In a three page, detailed ruling, the Commissioner of that court denied plenary review, but stated, among other things:

> Further, the Court of Appeals' treatment in Mr. Russell's appeal of each of his three renewed legal issues still appears to be fully consistent with applicable case law. See State v. Russell, supra, 33 Wn. App. at 587-589. The more recent cases Mr. Russell

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[3]/ The Washington Supreme Court has concurrent original jurisdiction over personal restraint petitions along with the Washington Court of Appeals. Washington Rule Of Appellate Procedure "RAP" 6.3(c).

cites do not change the governing rules of law.

Ruling Denying Discretionary Review, p. E-3 to the Petition herein (emphasis added). The Commissioner's Order also found correct the Court of Appeals' dismissal of Mr. Russell's Personal Restraint Petition because the issues had previously been litigated in that court. Ibid. The Commissioner concluded:

> In sum, Mr. Russell has not shown that the Acting Chief Judge [of the Court of Appeals] erred by dismissing his personal restraint petition or that review is otherwise merited...

Id. at E-3 (emphasis added). Mr. Russell then addressed to a panel of five justices of the Washington Supreme Court a Motion To Modify Commissioner's Ruling.[4] That motion was considered by the justices and denied. Appendix A hereto.

Mr. Russell next filed a second petition for writ of habeas corpus in the District Court. Now the State moved for summary judgment, this time claiming that Mr. Russell was procedurally barred from litigating his constitutional claims in federal court unless he showed "cause and prejudice" for his alleged procedural default. CR 6 below. Mr. Russell, now acting pro se, responded, inter alia, that the Washington Supreme Court did in fact consider the merits of his constitutional arguments when it found the Court of Appeals' rejection of those arguments "in Mr. Russell's appeal" to be "consistent with applicable case law"; that in any event there was no state law bar in any sense adequate to prevent federal review; and that his attorney's

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[4]/ See discussion at pp. 13-15, below.

attempts to have the issues heard in the Washington Supreme Court on direct appeal constituted sufficient "cause" to allow his habeas petition to go forward. CR 9.[5]

A United States Magistrate recommended that the District Court find that the Washington Supreme Court had reviewed Mr. Russell's federal constitutional claims on the merits in his personal restraint proceeding, and therefore that the federal habeas petition be heard on the merits. CR 10 below. The District Court disagreed, and dismissed the petition for failure to demonstrate "cause and prejudice". Appendix C to the Petition.

Mr. Russell, now acting through counsel, then appealed to the United States Court Of Appeals. In an opinion written by Judge Trott, a majority of the panel held that the detailed written decision of the Washington Supreme Court[6] simply failed to contain a statement "clearly and expressly" grounding its decision on a state procedural bar as required by Harris v. Reed, 489 U.S. 255 (1989), and noted there was no applicable state procedural rule barring Mr. Russell from bringing before the Washington Supreme Court in a personal restraint petition claims

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[5]/ Petitioner's claim that as to the estoppel question, "Russell had bandoned [sic] it by failing to present it" in federal court (Petition at 5, n.8) is incorrect. Mr. Russell specifically argued estoppel in his opposition to the State's summary judgment motion in federal district court. CR 9 at 2-3.

[6]/ The Petitioner premises much of its argument on trying to suggest that this ruling was not a decision or judgment of the Washington Supreme Court. However, as is shown at pp. 13-17, below, this premise is incorrect.

that had been previously brought in the Washington Court Of Appeals on direct appeal. Russell v. Rolfs, 893 F.2d at 1035-1037. As a completely alternative holding, the Court Of Appeals found that the State had taken directly contrary positions in federal and then state court regarding the availability of a personal restraint petition to bring Mr. Russell's federal constitutional claims before the Washington Supreme Court, and said that even if the State's claim of procedural bar had not failed the relevant federal requirements, the State would be estopped from preventing a hearing on the merits. Id., 893 F.2d at 1037-1039.[7]

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE WAS NO STATE PROCEDURAL BAR APPLICABLE TO THE PRESENT CASE, AND SO THE ISSUES LISTED IN THE PETITION ARE NOT PRESENTED HERE.

The State repeatedly suggests that the State courts applied an adequate and independent state procedural ground which should bar federal review of the merits of Mr. Russell's constitutional claims. E.g., Petition at 4, 12, 13. The State assumes far too much. State law threw up no such bar in this case.

In order to claim a state procedural default, the State must show that there was a clear, firmly established state procedural rule that held that if a claim or objection was not raised by a specific stage, it could not be raised later. James v. Kentucky

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[7]/ The Court Of Appeals did not fully reach Mr. Russell's arguments that, in any event, the State's proposed procedural bar did not qualify as an "adequate state ground" to prevent federal review on the merits. See pp. 11-13 of this Brief, below.

466 U.S. 341, 348-349 (1984); Ulster County Court v. Allen, 442 U.S. 140, 150 (1979). See, for example, the rules referenced in Hankerson v. North Carolina, 432 U.S. 233, 244 f.n. 8 (1977) and Engle v. Issac, 456 U.S. 107, 115 f.n. 15 (1982).

The State's attorney alleged in the court below that Mr. Russell committed a state procedural default when his counsel failed to include in his Petition For Review on direct appeal to the Washington Supreme Court the habeas claims he now raises in federal court:

> The default occurred in 1983 when [Mr. Russell] filed his Motion For Discretionary Review [actually Petition For Review] which did not include his present claims.

Brief of Respondent-Appellee below, p. 12. However, although it is true that the claims now at issue were not in that Petition For Review and arguably not then passed upon by the Washington Supreme Court, it is not true that this amounted to a state procedural default precluding a later review in the Washington Supreme Court. Washington law at the relevant time explicitly eschewed such a bar. In In re Lee, 95 Wash. 2d 357, 623 P.2d 687 (1980), overruled on other grounds, In re Hews, 99 Wash. 2d 80, 660 P.2d 263 (1983), the Washington Supreme Court held that where an issue had been raised on direct appeal but not included in a request for review in the Washington Supreme Court -- as one petitioner (Malone) in Lee had done -- it could be later raised and heard on the merits in a personal restraint petition. 623 P.2d at 692. Thus, there is no cognizable procedural bar here.

The State proposes that the alleged procedural bar is the

Washington Court Of Appeals' determination that under In re Taylor, 105 Wn.2d 683, 717 P.2d 755, 757 (1986), it would not rehear the same issues in a personal restraint petition. Petition herein at 9. However, even apart from the fact that this Washington Court Of Appeals order is not even the relevant decision for purposes of applying federal law (see §II below), the Taylor rule could not bar federal review in this case, for several reasons.

First, Taylor does not establish any strictly followed procedural waiver rule: "[W]e hold the mere fact that an issue was raised on appeal does not automatically bar review in a PRP." Taylor, 717 P.2d at 758 (emphasis added). This is not a procedural bar rule, i.e. a rule that holds that a failure to raise an issue at a particular time "is a waiver of any claim of error". Hankerson, 432 U.S. at 244 f.n. 8. Instead, application of Taylor is so bound up with review of the merits of claims that the Taylor rule can in no sense be seen as a procedural bar applied "independent" of the federal constitutional merits. See Ake v. Oklahoma, 470 U.S. 68, 75 (1985).[8] Indeed, a Taylor ruling such as the one in the present case by the Washington Court Of Appeals indicates that the merits have been fully reached once and then reviewed a second time. Appendix D to the Petition herein. This is not an adequate state procedural

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[8]/ The determination under Taylor of whether a petitioner may relitigate an issue requires inquiry into the merits. 717 P.2d at 757-758.

ground.

Second, the Taylor rule did not exist at the time Mr. Russell allegedly defaulted, i.e. on the filing of his Petition For Review in the Washington Supreme Court on direct review in 1983. Taylor was decided in 1986. At the time of Mr. Russell's direct appeal, the discernible law in Washington was that constitutional issues could be raised at any time in a personal restraint petition. In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982); In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983). Moreover, even before Hagler and Hews made that clear, it was plainly the law that issues that had been litigated on direct appeal but left out of a request for review in the Washington Supreme Court could be resurrected in a personal restraint petition. In re Lee, supra.[9]

New state rules cannot be applied retroactively to try to prevent federal review of constitutional claims. Ford v. Georgia, ____ U.S. ____, 111 S.Ct. 850, 857 (1991), citing James v. Kentucky, 466 U.S. at 348-351, and other cases. Application of Taylor to Mr. Russell's actions in 1983 therefore could not

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[9]/ The dissent below asserts that the treatment of petitioner Malone in In re Lee was an application of the Taylor rule in that Lee involved retroactive application of a change in the law. 893 F.2d at 1041. But Lee could hardly have applied Taylor because Lee was decided six years before Taylor. Moreover, as Lee itself makes clear, there was no new law at stake to be applied retroactively. 623 P.2d at 690. Rather, the Washington Supreme Court found that the law extant at the time Malone prosecuted his direct appeal should have provided relief for him then. Id. at 691. Thus, he was clearly allowed to relitigate his same claim.

prevent federal review.

This case therefore presents nothing like the issues put forth in the Petition. There was no cognizable state procedural default or clear procedural bar rule that operated to bar Mr. Russell from raising his claims in federal court.[10] The petition should be denied.

II. THE COURT OF APPEALS WAS FULLY JUSTIFIED, INDEED OBLIGED UNDER HARRIS V. REED, IN REVIEWING FOR A "PLAIN STATEMENT" OF STATE GROUNDS THE THREE-PAGE DECISION OF THE WASHINGTON SUPREME COURT RATHER THAN THE ONE-PAGE ORDER OF A SINGLE WASHINGTON COURT OF APPEALS JUDGE.

As is shown above, the State premises its arguments on the incorrect assertion that there was a state procedural bar. The State further premises its argument that the Court Of Appeals misapplied Harris v. Reed on a claim that the Washington Supreme Court did not render judgment on Mr. Russell's State post-conviction petition. Petition at 8-11. As is shown here, this premise is also wrong.

As the State concedes, after the Acting Chief Judge of the Washington Court Of Appeals dismissed Mr. Russell's personal restraint petition in a brief order (Petition Appendix D), Mr. Russell filed in the Washington Supreme Court a Motion for Discretionary Review of that decision. This motion resulted in a written 3-page Commissioner's Ruling Denying Review. Appendix E

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[10]/ Even if there were such a rule, it nevertheless could not meet the other federal standards of adequacy as a state ground preventing federal review, as it lacks clear enunciation and consistent application. See e.g., James v. Kentucky, 466 U.S. 341 (1984).

to the Petition. As the State fails to mention, Mr. Russell then moved under Washington Rule Of Appellate Procedure ("RAP") 17.7 for a five-member panel of the Washington Supreme Court to modify and reverse the Commissioner's Ruling.[11] By order signed by the Chief Justice, those five justices declined to modify the Commissioner's decision. Appendix A hereto.

Contrary to the State's assertions, these actions did make the Washington Supreme Court "the last state court rendering a judgment." Harris v. Reed, 489 U.S. at 263. Washington RAP 1.1(f) provides that the action of a commissioner is an action of the court:

> **Action of Appellate Court.** The appellate court clerk and commissioner are given authority by these rules to make some decisions, called rulings. An act performed on the authority of these rules is action taken by the appellate court whether that act is performed by the clerk or a commissioner or by the judges of the Supreme Court or the Court of Appeals.

Moreover, in this case a panel of five Washington Supreme Court justices were asked to overturn this ruling,[12] but on consideration determined not to change it. Obviously the

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[11]/ Washington RAP 17.7 provides in relevant part:

> **OBJECTIONS TO RULING - REVIEW OF DECISION ON MOTION.** An aggrieved person may object to a ruling of a commissioner or clerk... [only by a motion to] modify the ruling directed to the judges of the court served by the commissioner or clerk... A motion to the justices in the Supreme Court will be decided by a panel of five justices unless the court directs a hearing by the court en banc. [Emphasis added.]

[12]/ See Washington RAP 17.7, quoted in footnote 11, above.

Washington Supreme Court rendered a detailed decision, with reasons stated, on Mr. Russell's efforts to gain post-conviction relief in state court.[13] Indeed, in another section of its Petition, the State in essence concedes this by stating "In his ruling denying discretionary review, the Supreme Court Commissioner... held that the state was not estopped..." Petition at 13, n.16 (emphasis added).

Thus, the State absurdly proposes that a one-page summary ruling by a single Judge of the Washington Court Of Appeals should be taken as the judgment of the last state court to rule, but the detailed three-page statement of reasons issued by a commissioner and approved by five justices of the Washington Supreme Court should be ignored. Obviously, the Washington Supreme Court's decision was the proper one for scrutiny under Harris v. Reed, and this case fails to present the issues the State attempts to advance.[14]

For similar reasons, there exists no split among circuit

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[13]/ Judge Trott, in his opinion in the Court of Appeals called the commissioner's ruling a "report". 893 F.2d at 1035. And indeed such a ruling does serve a function very similar to a U.S. Magistrate's "Report And Recommendation". See 28 U.S.C. §636. Just like such a Report and Recommendation, the Commissioner's ruling, if adopted or left unchanged by the justices, clearly becomes the statement of reasons underlying the court's judgment.

[14]/ The State's focus on the Washington Court Of Appeals' ruling is also misleading because the exhaustion issue in the first federal habeas case was whether Mr. Russell had properly presented his claims to the Washington Supreme Court. All parties agreed he had presented them to the Washington Court Of Appeals, which is why he filed his personal restraint petition in the Washington Supreme Court.

decisions as Petitioner contends. All of the cases Petitioner cites to try to manufacture such a split deal with "silent" denials of review by a state's highest court; as the State itself says, the issues in those cases involve "a state supreme court's unexplained denial of certiorari to review..." Petition at 8 (emphasis added). None of the cases cited deal with the situation presented here, where the state supreme court provided a detailed statement of reasons for decision. As explained in one of the cases cited by Petitioner, under Harris federal courts should at least look to "the opinion given by the highest state court that has supplied an explanation." Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990) (emphasis added). In this case, that was obviously the Washington Supreme Court, in its detailed statement of reasons. See also the other cases cited by the State: Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir.) cert. denied, 111 S.Ct. 96 (1990) ("affirmance without comment" is at issue); Felton v. Barnett, 912 F.2d 92, 94 (4th Cir. 1990) (denial without explanation in state supreme court); Goodwin v. Collins, 910 F.2d 185, 186 (5th Cir. 1990) (denial by Texas Court Of Criminal Appeals "without written opinion"). Unlike those cases, here the federal Court Of Appeals was not left "to speculate on what basis the state court denied petitioner's claim" (Harmon, 894 F.2d at 1273); rather, there was a three-page

statement of reasons from the Washington Supreme Court.[15]

All the Court Of Appeals did in this case was follow Harris v. Reed to the letter. The Court Of Appeals looked at a detailed statement of reasons for denial of relief supplied by the Washington Supreme Court, found that it was ambiguous and lacked a "plain statement" of procedural default as the basis of its ruling, and therefore found no "adequate state ground" precluding federal review, all as commanded by Harris, 489 U.S. at 260-263. Acceptance of such a case for review by this Court would accomplish exactly what the decision in Harris sought to avoid: The involvement of this Court in reviewing every lower court application of Harris that results in rejection of the State's procedural bar argument. This case involves nothing more than the State's request for such a review of a federal court's straightforward application of Harris, and the petition for certiorari should therefore be denied.

III. THE COURT OF APPEALS' ESTOPPEL RULING IS FACT-BOUND AND UNIQUE TO THIS CASE AND THEREFORE INAPPROPRIATE FOR RESOLUTION IN THIS COURT.

The estoppel decision in the Court Of Appeals was a wholly alternate ground for decision, based on the unique facts of this case. The State specifically stated in the first federal habeas case not just that State remedies had not been exhausted (even

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[15]/ Consequently, this case is also totally unlike a case now before this Court, Ylst v. Nunnemaker, No. 90-68. In Ylst, the issues involve the meaning under Harris of a state supreme court's denial "without comment" of a post-conviction petition. Ylst Cert. Petition at 11-12.

though Mr. Russell's counsel had tried to present and argue all of his claims to the Washington Supreme Court), but also specifically said that there was an adequate and available remedy by way of personal restraint petition to bring his claims before the appropriate court to accomplish exhaustion, the Washington Supreme Court.[16] Then as soon as Mr. Russell filed precisely the form of petition in the Washington Supreme Court that the State had called "available" in its federal pleadings, the State specifically argued in the Washington Supreme Court that this remedy was not available. Next the State argued on the second habeas petition that Mr. Russell had been procedurally defaulted in state court.

The Petition conveniently fails to mention crucial parts of this factual context, i.e. the State's active switch in position from federal to state court. The Court Of Appeals did not hold that as a general matter, "[w]hen the state fulfills its statutory obligation to advise the court that a federal habeas petitioner has failed to exhaust state remedies... the state [is] precluded from asserting a procedural bar defense in response to a second petition..." (Petition at i, statement of question 2). Rather the Court Of Appeals simply invoked equitable doctrines that are inherently case-by-case in nature and found that because here the State had gone beyond merely saying that State remedies had not been exhausted, but had also said what specific state

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[16]/ The Washington Court Of Appeals had already heard the claims.

remedy was "adequate and available" and then specifically argued in state court that that exact remedy was not available, the State could not assert a procedural bar defense to the second federal habeas petition.

This was an unremarkable decision. Habeas defenses -- even statutory ones -- can be waived by specific state conduct in a given case. Granberry v. Greer, 481 U.S. 129, 134-135 (1987) (courts of appeals can decide on case-by-case basis whether nonexhaustion defense has been or may be waived). See also Davis v. Wakelee, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

The Court Of Appeals held that on the unique facts of this case such a waiver by conduct had occurred.

The State is not put in the difficult position it claims by Judge Trott's opinion. Attorneys for the State do not have as their primary function winning cases; rather, they are to seek substantial justice. See Berger v. United States, 295 U.S. 78, 88 (1935); ABA Standards for Criminal Justice, 3-1.1(c) (2d Ed. 1980). Although statutorily required to advise the federal court of possible exhaustion problems, state attorneys are not foreclosed from waiving defenses in the interests of justice or other important values. Granberry. Most importantly, no state attorney ever risks waiver of a procedural default defense unless

he or she diametrically changes positions between courts, "and the upshot is to whipsaw the petitioner back and forth between two court systems." Russell v. Rolfs, 893 F.2d at 1038. This specific set of facts is highly unlikely to recur.[17]

Obviously, then, the Court Of Appeals' holding was not, as the State suggests, that the State can never claim nonexhaustion in a first habeas petition and procedural bar in a second. Rather, Judge Trott's opinion is totally based on a set of circumstances highly unlikely to recur, in which the State actively sought advantages from federal court to state court to federal based on diametric changes in position. This fact-bound ruling would not merit a grant of certiorari in any case. In the present case, given the serious defects in the adequacy of the state grounds the state asserts, and the Court Of Appeals' straightforward Harris holding which completely supports its decision, there is even less reason for this Court to grant the writ. The petition should be denied.

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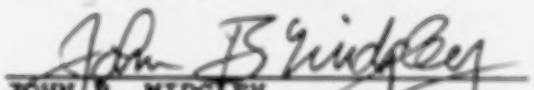
[17]/ The State also suggests that the Court Of Appeals majority is not cognizant of the differences between, and the importance of, the exhaustion doctrine and procedural bar jurisprudence. Petition at 12, 14. However, Judge Trott, the author of the majority opinion, is well acquainted with the doctrines at issue. See his analysis barring a claim in Tacho v. Martinez, 862 F.2d 1376, 1378-1380 (9th Cir. 1988). Clearly the decision in this case is based on the special facts presented here, not on any lack of enthusiasm for procedural bar doctrine.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: March 29, 1991.

Respectfully submitted,



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APPENDIX A

THE SUPREME COURT OF WASHINGTON

NO. 53910-3
COURT OF APPEALS NO. 20075-5-I

In the Matter of the Personal Restraint Petition of: LOUIS EUGENE RUSSELL, Petitioner.	)	ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

This matter came on before the Court on its October 6, 1987, Motion Calendar on Petitioner's Motion to Modify Commissioner's Ruling. The Court having considered the Motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 6th day of October, 1987.

VERNON R. PEARSON
Chief Justice

NO. 90-1370

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TOM ROLFS, Superintendent, Petitioner, v. LOUIS EUGENE RUSSELL, Respondent.	AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
: ss.
County of Thurston)

I, John B. Midgley, a member of the Bar of this Court, hereby certify that on the 29th day of March, 1991, I mailed, first class postage prepaid, one copy of Respondent's Brief In Opposition and one copy of Respondent's Motion To Proceed In Forma Pauperis, to:

John M. Jones
Assistant Attorney General
Corrections Division
Mail Stop PZ-11
Olympia, WA 98504

I further certify that all parties required to be served have been served.

John B. Midgley

JOHN B. MIDGLEY
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101 Yesler Way, Suite 301
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SUBSCRIBED AND SWORN TO before me this 29th day of March, 1991.



Shirley A. Gregory

NOTARY PUBLIC in and for the State of Washington, residing at: Seattle.
My commission expires: May 25, 1991